**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **GLENN E. RAGLON, SR.**<br>Claimant | ) | |
| VS. | ) | |
| **UNITED PARCEL SERVICE, INC.**<br>Respondent | ) | Docket No. 1,041,279 |
| AND | ) | |
| **LIBERTY MUTUAL INSURANCE CO.**<br>Insurance Carrier | ) | |

# ORDER

## STATEMENT OF THE CASE

Claimant requested review of the March 3, 2010, Order entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on May 11, 2010. Glenn E. Raglon, Sr., claimant, appears pro se. Frederick J. Greenbaum, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) dismissed the case.

## ISSUES

Claimant appeals the dismissal of his workers compensation claim. He asserts that the ALJ failed to provide him with a hearing on his request for sanctions and failed to address the issue of respondent's unilateral termination of his temporary total disability benefits before scheduling the hearing on respondent's motion to dismiss. Claimant also contends the ALJ's order that he submit to an independent medical examination (IME) was limited by Dr. Carabetta's policy of performing IMEs only on certain days of the week. Claimant also argues that respondent failed to provide written evidence that claimant's former attorney contacted claimant to advise him of the scheduling of the IME. Further, claimant contends that after he terminated his attorney, respondent failed to contact him to reschedule his deposition. Last, claimant contends respondent failed to provide his former attorney with several documents.

Respondent argues that claimant repeatedly refused to submit to an IME that had been ordered by the ALJ and, accordingly, the ALJ's dismissal of the claim should be affirmed.

The issue for the Board's review is: Was the dismissal of this claim proper under K.S.A. 44-518 because claimant refused to submit to a medical examination ordered by the ALJ?

## FINDINGS OF FACT

On July 31, 2008, claimant filed an Application for Hearing claiming injuries to his groin, right hand and arm in an accident at work on May 8, 2008. On December 29, 2008, the ALJ ordered claimant to appear for an IME performed by Dr. Vito Carabetta. The IME was scheduled for February 23, 2009. For the convenience of claimant, respondent scheduled his deposition for the same date. On February 6, 2009, respondent's attorney received a call from claimant's attorney, Keith Mark, advising that the IME and claimant's deposition were being cancelled. Respondent's attorney's office called the office of claimant's attorney on March 11 and 30, April 3, 10 and 15, and May 4, 2009, to reschedule claimant's deposition.[1]

On May 4, 2009, respondent filed a Motion to Dismiss because claimant refused to appear for his deposition. On June 9, 2009, the ALJ entered an Order demanding that claimant submit to a telephonic deposition and produce his tax records and any records related to income he received in 2008. A telephone deposition of claimant was scheduled for August 6, 2009, but claimant said he would not appear for a deposition on that date. Another telephone deposition was scheduled for August 29, 2009. Claimant did not appear for that deposition.

On October 16, 2009, claimant filed a request for a 60-day continuance in this case, claiming he had dismissed his attorney and needed time to hire a new attorney.[2] On October 19, 2009, claimant filed a document entitled "Evidence to Support Continuance," in which he claimed that respondent failed to provide his former attorney with all his medical records and other documents in this case and that respondent's insurance carrier engaged in racial profiling by withholding temporary total disability benefits due. On November 19, 2009, claimant filed a Request for Sanctions, claiming respondent wrongfully cut off his temporary total disability benefits before he was released to modified duty. There is no evidence in the record that claimant requested a hearing date on his Request for Sanctions.

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[1] Motion to Withdraw Trans. (Mar. 2, 2010), Ex. 10 at 1.

[2] The ALJ entered an order dismissing Keith Mark and his firm from the case on November 25, 2009. At this time, there has been no entry of appearance filed by an attorney on behalf of claimant, and he is appearing pro se.

On December 10, 2009, respondent filed a Motion to Dismiss on the basis of claimant's failure to appear for his deposition and failure to submit himself to Dr. Carabetta for an IME. At the hearing on the motion, respondent's attorney stated that claimant apparently called Dr. Carabetta's office to schedule an IME and was told it could be scheduled in January 2010. Claimant apparently told Dr. Carabetta's office that he needed to have the appointment in November 2009. After this conversation, Dr. Carabetta's office called the office of respondent's attorney and asked if they could schedule the IME with claimant, as its understanding was that respondent's attorney would be scheduling the IME. Respondent's attorney told Dr. Carabetta's office to schedule the IME. Respondent's attorney stated that Dr. Carabetta's office then called claimant to schedule the IME, leaving messages, but claimant did not return its calls.

On January 11, 2010, claimant filed a Notification to the Court claiming that KU MedWest had refused to release documents to him and asking the ALJ to order that depositions be taken to address claimant's claim of racial profiling. In this document, claimant stated that he had attempted on several occasions to schedule an IME with Dr. Carabetta's office without success "due to the ongoing 1-2 months of foreseen availability to get an appointment."[3] In a January 12, 2010, letter to claimant, with a copy to the ALJ, respondent's attorney stated: "Our understanding from Dr. Carabetta's office is that you have made one telephone call to their office and they did not have an available appointment on the single date you were available."[4] In the same letter, respondent's attorney forwarded claimant his medical records from various providers.

On February 11, 2010, claimant was sent by certified mail a Notice of Hearing on Motion to Dismiss. The hearing was scheduled for March 2, 2010, at 1 p.m. On February 22, 2010, claimant filed a request for a 120-day continuance regarding the Motion to Dismiss so he could discover ongoing malicious racial profiling, cover up, and misconduct regarding documents. Claimant accused respondent of delay tactics and refusal to provide him with necessary documentation related to his workers compensation case. There is no evidence in the record that claimant asked for a hearing on this request for a continuance.

On March 2, 2010, a hearing on the Motion to Dismiss was held. The ALJ announced that at 12:11 p.m., the Division received a fax from claimant indicating that he would not be in attendance at the hearing on the Motion to Dismiss and stating that the court had not yet addressed the issues of racial profiling and abusive acts. Respondent's attorney was not willing to continue the hearing on the motion to dismiss. At the hearing, respondent entered a number of exhibits. The ALJ took the matter under advisement, and on March 3, 2010, issued an Order finding:

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[3] Claimant's Notice to the Court filed Jan. 11, 2010, at 2.

[4] Respondent's correspondence to Claimant filed Jan. 19, 2010, at 1-2.

WHEREUPON, the Court, after hearing the statements of counsel, listening to the testimony, being duly advised in the premises, and examining the exhibits, finds:

Motion by Respondent/Insurance Carrier to Dismiss: Sustained.[5]

## PRINCIPLES OF LAW

K.S.A. 44-515 states:

(a) After an employee sustains an injury, the employee shall, upon request of the employer, submit to an examination at any reasonable time and place by any one or more reputable health care providers, selected by the employer, and shall so submit to an examination thereafter at intervals during the pendency of such employee's claim for compensation, upon the request of the employer, but the employee shall not be required to submit to an examination oftener than twice in any one month, unless required to do so in accordance with such orders as may be made by the director. Any employee so submitting to an examination or such employee's authorized representative shall upon request be entitled to receive and shall have delivered to such employee a copy of the health care provider's report of such examination within 15 days after such examination, which report shall be identical to the report submitted to the employer. If the employee is notified to submit to an examination before any health care provider in any town or city other than the residence of the employee at the time that the employee received an injury, the employee shall not be required to submit to an examination until such employee has been furnished with sufficient funds to pay for transportation to and from the place of examination at the rate prescribed for compensation of state officers and employees under K.S.A. 75-3203a and amendments thereto, for each mile actually and necessarily traveled to and from the place of examination, any turnpike or other tolls and any parking fees actually and necessarily incurred, and in addition the sum of $15 per day for each day or a part thereof that the employee was required to be away from such employee's residence to defray such employee's board and lodging and living expenses. The employee shall not be liable for any fees or charge of any health care provider selected by the employer for making any examination of the employee. The employer or the insurance carrier of the employer of any employee making claim for compensation under the workers compensation act shall be entitled to a copy of the report of any health care provider who has examined or treated the employee in regard to such claim upon written request to the employee or the employee's attorney within 15 days after such examination or treatment, which report shall be identical to the report submitted to the employee or the employee's attorney.

(b) If the employee requests, such employee shall be entitled to have health care providers of such employee's own selection present at the time to participate in such examination.

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[5] ALJ Order (Mar. 3, 2010).

(c) Unless a report is furnished as provided in subsection (a) and unless there is a reasonable opportunity thereafter for the health care providers selected by the employee to participate in the examination in the presence of the health care providers selected by the employer, the health care providers selected by the employer or employee shall not be permitted afterwards to give evidence of the condition of the employee at the time such examination was made.

(d) Except as provided in this section, there shall be no disqualification or privilege preventing the furnishing of reports by or the testimony of any health care provider who actually makes an examination or treats an injured employee, prior to or after an injury.

(e) Any health care provider's opinion, whether the provider is a treating health care provider or is an examining health care provider, regarding a claimant's need for medical treatment, inability to work, prognosis, diagnosis and disability rating shall be considered and given appropriate weight by the trier of fact together with consideration of all other evidence.

K.S.A. 44-518 states:

If the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515 and amendments thereto or if the employee or the employee's health care provider unnecessarily obstructs or prevents such examination by the health care provider of the employer, the employee's right to payment of compensation shall be suspended until the employee submits to an examination and until such examination is completed. No compensation shall be payable under the workers compensation act during the period of suspension. If the employee refuses to submit to an examination while any proceedings are pending for the purpose of determining the amount of compensation due, such proceedings shall be dismissed upon showing being made of the refusal of the employee to submit to an examination.

K.A.R. 51-9-5 states:

An unreasonable refusal of the employee to submit to medical or surgical treatment, when the danger to life would be small and the probabilities of a permanent cure great, may result in denial or termination of compensation beyond the period of time that the injured worker would have been disabled had the worker submitted to medical or surgical treatment, but only after a hearing as to the reasonableness of such refusal.

K.S.A. 44-554 states:

The director or the administrative law judge, whoever is conducting the hearing or other proceeding, or any party affected by the hearing or proceedings may cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil actions in district courts in this state.

In *Acosta*,[6] the Kansas Supreme Court held:

> Further, notwithstanding Larson's opinion regarding the inherent power of courts to set aside judgments procured by fraud, the fact remains the ALJ and the Board are both administrative bodies. "'Administrative agencies are creatures of statute and their power is dependent upon authorizing statutes, therefore any exercise of authority claimed by the agency must come from within the statutes. There is no general or common law power that can be exercised by an administrative agency.'" *Legislative Coordinating Council v. Stanley*, 264 Kan. 690, 706, 957 P.2d 379 (1998). Further, the Workers Compensation Act is substantial, complete, and exclusive, covering every phase of the right to compensation and of the procedure for obtaining it. See *Jones v. Continental Can Co.*, 260 Kan. 547, 557, 920 P.2d 939 (1996).

## ANALYSIS

Although the ALJ's Order of March 3, 2010, is silent as to the basis for his dismissal of the claim, a review of the transcript of the March 2, 2010, proceeding entitled Transcript of Motion to Withdraw [*sic*] shows that the dismissal was entered pursuant to K.S.A. 44-518 for "refusal to submit for examination while proceedings are pending . . . ."[7] The examination at issue is the examination by a court-ordered neutral medical examiner, namely, Dr. Vito Carabetta, for a functional impairment rating of the hand, "pursuant to K.S.A. 44-516 and/or K.S.A. 44-510."[8] The examination was specifically not to address restrictions or causation. Clearly, the examination was not for treatment or to provide recommendations for treatment because an impairment rating opinion per the AMA *Guides*[9] cannot be rendered until after the injured worker has reached maximum medical improvement.

K.S.A. 44-518 applies when "the employee refuses to submit to an examination upon request of the employer as provided for in K.S.A. 44-515." K.S.A. 44-518 does not apply when the employee refuses to submit to an examination upon the request or order of the ALJ. K.S.A. 44-518 specifically references K.S.A. 44-515. It does not reference an examination conducted pursuant to K.S.A. 44-516 or K.S.A. 44-510. Furthermore, the

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[6] *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 396, 44 P.3d 330 (2002).

[7] Motion to Withdraw Trans., Mar. 2, 2010, at 8.

[8] ALJ Order (Dec. 29, 2009) at 1.

[9] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

statute contemplates the suspension of compensation or of the proceedings to obtain compensation, not a dismissal of the claim.[10]

The Workers Compensation Act does not provide for dismissal of a claim as a remedy for a claimant's failure to appear at a deposition. The Act only provides two remedies. Respondent can do nothing and if no hearing is held within five years of the date of the filing of the Application for Hearing (Form E-1), then the case will be dismissed for lack of prosecution per K.S.A. 2009 Supp. 44-523(f). In the alternative, respondent can request the case be set for regular hearing and for terminal dates to be set per K.S.A. 2009 Supp. 44-523(b).

## CONCLUSION

The ALJ was without jurisdiction to dismiss the claim.

## AWARD

**WHEREFORE**, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated March 3, 2010, is reversed.

**IT IS SO ORDERED.**

Dated this _____ day of May, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Glenn E. Raglon, Sr., pro se claimant, P.O. Box 671404, Houston, TX, 77267
Frederick J. Greenbaum, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge

[10] See K.A.R. 51-3-1.